

**LAW OFFICE OF JAMES E. MEYERS**  
1555 CONNECTICUT AVENUE, NW, SUITE 500  
WASHINGTON, DC 20036 -1103  
202-232-2900 (EXT. 104)  
Fax: 202-232-2912

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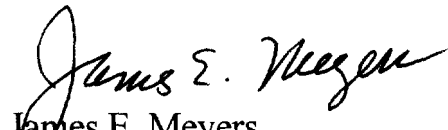
Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20054

Re: CS Docket No. 96-46  
City of Olathe, KS

Dear Mr. Caton:

On behalf of the City of Olathe, Kansas, transmitted herewith are an original and thirteen copies of its comments for Commission distribution and additional public file copies. Should you have questions, please contact the undersigned.

Very truly yours,

  
James E. Meyers  
Counsel for the City of Olathe, KS

Enc.

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Implementation of Section 302 of ) CS Docket No. 96-46  
the Telecommunications Act of 1996 )  
)  
Open Video Systems )

In the Matter of )  
)  
Telephone Company-Cable ) CC Docket No. 87-266 (Terminated)  
Television Cross-Ownership Rules, )  
Sections 63.54-63.58 )

TO: The Commission

COMMENTS OF CITY OF OLATHE, KANSAS

Respectfully submitted,

CITY OF OLATHE, KANSAS

By: James E. Meyers  
Its Counsel

LAW OFFICE OF JAMES E.  
MEYERS  
1555 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20036  
1.202.232.2900  
1.202.232.2912 (Fax)

## SUMMARY

Open video systems should be required to duplicate PEG access requirements of co-located cable systems in both existing and renewed franchises and irrespective of whether the open video system serves multiple cable franchise areas. Open video systems should interconnect with the existing cable operator's PEG feed and should be required to carry such programming live or "virtual" live.

PEG (and must-carry) signals should be provided, on a non-discriminatory basis, to all subscribers to the open video system, irrespective of whether the subscriber is "owned" solely by a non-affiliated video programming supplier.

PEG duplication requirements should be presumed "possible" and any claim of impossibility supported in the certification application by clear and convincing evidence. Applicant open video system operators must consult with and serve local franchising authorities with their applications. The Commission should process applications under rules similar to the manner in which franchising authorities certify rate regulation, subject to petitions for reconsideration (and automatic stay) as set forth in 47 C.F.R. §§ 76.910(b), 76.911.

Advanced communications services should be encouraged over open video systems, including by cable operators.

The Commission should reaffirm the intention of Congress that franchising authorities retain authority to regulate the use of their rights-of-way by open video systems.

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CC Docket No. 87-266 (Terminated)

TO: The Commission

COMMENTS OF CITY OF OLATHE, KANSAS

I. INTRODUCTION

The City of Olathe, Kansas ("Olathe"), through undersigned counsel, submits these comments to the Commission's Report and Order and Notice of Proposed Rulemaking, FCC 96-99 (released March 11, 1996) ("Notice") to promulgate regulations for "open video systems," mandated under section 653 (47 U.S.C. § 573) of section 302 of the Telecommunications Act of 1996, Pub. L. 104-104 (Feb. 8, 1996) ("Act").

## II. BACKGROUND

Olathe is a near suburb and an integral part of the Kansas City metropolitan area. The Olathe community possesses virtually all of the attributes that require a first-rate communications and telecommunications infrastructure.

Olathe's approximately 75,000 residents have a household income of about \$45,000, one of the highest in the nation without considering the higher purchasing power of the dollar in the Midwest than in other regions of the country. Extensive governmental, educational and private enterprise have established premises in Olathe. Olathe is the county seat of Johnson County, Kansas, home to the Federal Aviation Administration's air traffic control operations and the municipal services provider to major resident corporations and businesses.<sup>1</sup>

Olathe supports its own elementary and secondary school system, municipal library, police department, hospital, parks and recreational premises, and a full array of municipal facilities and services that its citizens have come to expect and require. Olathe's school system has a student population of over 17,000 students matriculating in three high schools, five junior high schools and 23 elementary schools. Olathe is also home to the Johnson County Community College metro

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<sup>1</sup>Some of Olathe's major employers and businesses are: Allied Signal (aviation communications); Garmin International, Inc. (satellite tracking systems manufacturer); International Paper; Delco Battery; Mid-Central Cisco (food distributors); Marley Corporation (cooling tower manufacturers); Dillards Department Stores (regional warehousing facilities); Cintas Corporation (uniform rental and laundry facilities).

campus and the Mid-America Nazarene College. Olathe and its citizens have extensive residential and commercial communications requirements and believe they are an attractive and likely market for open video systems and other innovations surely to be engendered by the Act.<sup>2</sup>

As a provider of educational and governmental access programming under its franchise agreement with the cable operator, Olathe is particularly concerned that the Public, Educational and Governmental (“PEG”) channel requirements for open video systems be carefully and correctly implemented in keeping with Congress’ consistent recognition and reaffirmation that PEG channel capacity requirements are a uniquely local and fundamental aspect of cable television and open video systems.<sup>3</sup>

Olathe is similarly concerned that the provision of advanced telecommunications services be accomplished by telecommunications carriers as rapidly as possible, and supports the use of open video systems to achieve this end, provided that the system is truly “open” to all providers, including the local cable

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<sup>2</sup>Olathe’s local exchange carrier franchisee, Southwestern Bell Telephone Company, has entered the cable television business, and Olathe’s cable television franchisee, Jones Intercable Partnership, is actively pursuing providing telecommunications services in some of its cable television franchise areas.

<sup>3</sup>Section 611 of the 1984 Act and amended Section 623[(b)(7)(A)(ii)] of the ‘92 Act firmly embody the national policy of fostering the development and availability of PEG access to cable television systems. Congress reaffirmed the public interest in accessible PEG (and must-carry) programming in section 653, clearly mandating that open video systems have the same PEG (and must-carry) requirements as cable system(s). Act § 653(c)(2)(A).



operator.

## II. PEG ACCESS TO OPEN VIDEO SYSTEMS

### A. OPEN VIDEO SYSTEMS SHOULD BE REQUIRED TO DUPLICATE THE INCUMBENT CABLE OPERATOR'S OBLIGATIONS, INCLUDING IN FRANCHISE RENEWALS

#### 1. Duplication of PEG Obligations in Existing Franchises

Congress was clear that the Commission must, “to the extent possible, impose obligations that are no greater or lesser than the obligations contained in [Section 611]” of Title VI of the Communications Act of 1934, as amended, that apply to a cable operator.<sup>4</sup> Act, § 653 (c)(2)(A). Section 611 (47 U.S.C. § 531) authorizes and expressly confirms the power of franchising authorities to establish the requirements by which cable operators must provide PEG access channels and related services, facilities and equipment over subscriber and institutional networks. Section 611 authorizes without limitation the authority of a franchising authority to establish requirements for PEG access channel designation and use, including educational and governmental access channel capacity on institutional

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<sup>4</sup>Although the Act does not expressly require that the cable operator to which section 611 might apply in a given case be located in the franchise area, the legislative history strongly suggests that Congress meant “cable operators in the corresponding franchise area” to the open video system, if a cable operator is present there. H. Rep. 104-458, 104 Cong., 2d Sess. (January 31, 1996) at Cong. Rec. H. 1126 (Daily Ed., January 31, 1996) (“Conference Report”) (discussing Act § 653(C)(2)(B)).

networks in new cable television franchises and, subject to the requirements of Section 626, in cable television franchise renewals. 47 U.S.C. § 531(a)-(c); Notice at ¶53. Accordingly, the Commission should require open video systems to ensure that the same PEG channel designations, PEG channel use and related services, facilities and equipment required in the franchise of a colocated cable system are provided over the open video system as part of its certification authorization.

2. Duplication of PEG Obligations in Cable Franchise Renewals

The Commission similarly should require that open video system operators update the system to comply with PEG requirements that are part of the cable operator's cable franchise renewal. Section 611 requires that PEG access requirements established by a franchising authority for a cable franchise renewal are "subject" to section 626 of the Communications Act of 1934, as amended. 47 U.S.C. §§ 531(b), 546. Section 626 requires, among other things, that future community needs and interests be determined in the context of the renewal proceeding and that requirements for a renewal franchise, including PEG requirements, be justified in light of those needs and interests, taking into account the cost to the cable operator of meeting those needs and interests. See 47 U.S.C. § 546(a),(c)(1)(D). By virtue of its incorporation of section 626, section 611 contains statutory assurances that franchising authorities update their cable PEG

requirements prudently and cost-effectively in a manner that meets the then-current and prospective community needs and interests. Accordingly, the Act implicitly requires that open video systems be subject to new PEG requirements that are contained in renewed cable franchises. Moreover, as a matter of law, by the express incorporation of section 626 into section 611, PEG requirements of renewed franchises are applicable to open video systems.

3. The Public Interest Requires That There Be a Presumption That Duplication of PEG Requirements is “Possible” and That Such Presumption May Only Be Met By Clear and Convincing Evidence

Cable operators’ PEG requirements are derived based on the community’s needs and interests and on the cable operator’s capabilities, including cost. In lieu of the capability of franchising authorities to establish separate PEG requirements for open video systems, the public interest requires that the cable operator’s requirements be replicated over the open video system. Cable PEG requirements are a reliable, and, under the regimen of the Act, the only surrogate to achieve the public interest benefit section 653(c)(1)(A) and (2)(A) clearly intended by mandating PEG requirements upon open video systems. Moreover, any departure from cable PEG replication requirements upsets the “parity” Congress intended between co-located cable and open video systems. H.Rep. 104-458, 104th Cong.,

1st Sess. (January 31, 1996) at Cong. Rec. H1126 (Daily Ed., January 31, 1996) (“Conference Report”) (discussing section 653(c)(2)(B)).

Any purported “impossibility” of duplication must be raised by the open video system applicant in its certification application and supported by a showing of clear and convincing evidence as to why it is impossible to replicate the requirement. The Commission should apply a strict standard of “impossibility.”<sup>5</sup> We note that there is no limit on the frequency by which an applicant may re-apply if its application is not approved. See section I.C., infra.

#### 4. PEG Programming Duplication

Olathe supports the concept of interconnecting directly with the PEG access channel programming feed being supplied to the cable operator. Notice at ¶57. However, where there is no “feed,” that is, where the programming is directly inserted at the cable system’s premises, interconnection with the system is in many cases the only way to ensure that the programming is retransmitted in its entirety over the open video system.

The open video system operator should bear the responsibility and the cost

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<sup>5</sup>It is noteworthy that in implementing the “tier buy-through” prohibitions of the ‘92 Act (47 U.S.C. § 543(b)(8)), which contained a “technological limitations” exception and not the more rigorous “impossibility” requirement, the Commission required cable operators to manually “trap” at each subscriber address non-complying service level configurations rather than to recognize the availability of the exception. See 47 C.F.R. § 76.921 and Report and Order, FCC 93-143 (Released April 1, 1993).

of “tapping” into or otherwise acquiring the feed inasmuch as the cable operator and the franchising authority have achieved resolution of those cost issues vis-a-vis the franchise agreement, and an open video system has no less an obligation under section 611 than its cable operator counterpart to provide PEG access programming over its system.

### 5. Live Programming

Live programming is an important aspect of PEG access channel programs. Live coverage of City Council meetings and other deliberations of governing bodies and administrative agencies are to many franchising authorities a central mission of access programming.

Open video systems with incompatible transmission standards (See Notice, ¶60) to accommodate live programming retransmission should carry the programming “virtually” live. Such “virtual” live programming may have to be ephemerally recorded and reformatted or otherwise adapted to accommodate different transmission requirements of open video systems, much as tape delay technology operates in broadcast television and radio. The open video system should be required to run such programming on as minimum a delayed basis as possible if it cannot accommodate live programming on a real-time basis.

## 6. Multiple Franchise Areas

Open video systems should be required to duplicate in the respective franchise area the PEG programming being provided in that area, as required by the co-located cable system. Channel blocking techniques enable cable operators and likewise provide no basis to preclude open video systems from providing the same PEG (and must-carry) programming in the franchise area that the co-located cable system is providing. The maximum number of channels required by any franchise within the service area of the open video system constitutes the floor or platform of PEG channels that the open video system operator must designate. Communities in the service area that have lesser channel capacity requirements are available to the open video system operator (as they are available to a cable system in the same situation) for other programming. PEG program insertion capability on a franchise-by-franchise area basis is a reasonable requirement and one to which cable operators routinely adhere where they are serving multiple communities off the same head-end.

B. PEG ACCESS PROGRAMMING (ALONG WITH MUST-CARRY SIGNALS) SHOULD BE PART OF THE MINIMUM SERVICE OFFERING FOR EVERY SUBSCRIBER TO THE OPEN VIDEO SYSTEM FOR THE SAME PRICE TO THE OPEN VIDEO SYSTEM, IRRESPECTIVE OF WHETHER THE OPEN VIDEO SYSTEM OPERATOR OR A VIDEO PROGRAMMING PROVIDER IS OFFERING THE SERVICE

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Open video systems must be configured in a manner that ensures that PEG (and must-carry) signals are part of the minimum service level provided to every subscriber to the system, irrespective of whether the subscriber is “owned” by a video programmer utilizing the system or by the open video system operator itself (or both in the case of redundant programming service offerings). This requirement is clearly mandated by the Act. Act § 653(c)(1)(B),(2)(A).<sup>6</sup>

Recognizing that must-carry signals are virtually copy-right free<sup>7</sup> and that PEG channels are provided to cable operators free of charge, PEG and must-carry are infrastructure costs to the open video system operator in the same manner as to

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<sup>6</sup>For example, must-carry signals, including vacant PEG channels used for must-carry purposes, must be provided to every subscriber to the cable system. 47 U.S.C. § 534(b)(7), (c)(2). By necessary implication, open video system subscribers, like cable system subscribers, may not “opt-out” of the open video system counterpart to basic cable service, that is, subscribe only to per-channel offerings or the open video system equivalent to cable programming service without being a subscriber to a functional “basic service tier” which, at a minimum, must contain the must-carry and PEG channels. See, e.g., 47 U.S.C. § 543(b)(7).

<sup>7</sup>17 U.S.C. § 111 is the cable television compulsory license. Must-carry stations are considered local. Under the compulsory license fee methodology, a system that carries local stations only pays a statutory fee of \$52.00 per year. See Act § 653(c)(4).

the cable operator. A reasonable approach to effectuating the plain intention of Congress that PEG and must-carry obligations be observed is to require the open video system operator to make must-carry and PEG channels available on the same basis to every subscriber, irrespective of to whom the subscriber belongs.<sup>8</sup>

Competitively neutral PEG/must-carry policy must be established to accomplish the statute's goals.<sup>9</sup> The Commission's tentative conclusion to, in effect, create a pool of must-carry and PEG channels, beyond which the open video system (or its affiliates) may program up to one third of the remaining channel capacity (Notice, ¶¶ 19, 57 n.74) correctly establishes the basis to ensure that PEG and must-carry are available to all subscribers equally, and to adopt pricing regulations for the open video system operator that avoids competitive advantages or disadvantages with respect to the availability of and end-user price for

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<sup>8</sup>Irrespective of whether service from the open video system is established in the subscriber's household directly by the system operator or through an unaffiliated video programmer, the entire open video system architecture will be available to the subscriber, ensuring that the cost of providing PEG and must-carry remains marginal and incremental.

<sup>9</sup>Subscribers would have less incentive to take service solely from an unaffiliated programmer if PEG and must-carry were not available or available at a higher price than directly through the open video system operator. By the same token, if a subscriber solely to an unaffiliated video programming supplier could opt out of PEG and must-carry service, the statute is frustrated and the open video system operator is forced to carry the subsidizing burden of making PEG and must-carry available solely by establishing a direct relationship with the customer, assuming the customer is a willing purchaser of PEG/must-carry. Again by the same token there is an inherent prejudice to the unaffiliated programming supplier if it is not permitted to provide PEG/must-carry service under its auspices, at the same price (and cost) the open video systems operator experiences.



PEG/must-carry signals. Accordingly, the Commission should explore a mechanism by which must-carry signals selected by the open video system operator and all PEG channels are made available as “shared channels” to all non-affiliated video programming suppliers, who in turn must make all such PEG and must-carry channels (or, respectively as to must-carry and at the programmer’s cost, permitted substitute must-carry signals) to those of its subscribers who are not direct subscribers to the open video system at the same price the open video system charges its direct subscribers. The open video system operator must charge and the unaffiliated programmer must remit to the open video systems operator the proceeds for PEG and must-carry (less internal cost adjustments or settlement mechanisms as may be equitable) so that neither the open video system operator nor the unaffiliated programmer is subsidizing or being subsidized by the other for the manner in which PEG and must-carry are being provided over the system.<sup>10</sup>

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<sup>10</sup>In the circumstance where the subscriber subscribes to more than one unaffiliated video programming provider but not to the open video system operator’s service, the subscriber should be given the option as to which provider it desires to receive its PEG/must-carry service.

C. CERTIFICATION PROCESS: DUPLICATION OF CO-LOCATED CABLE OPERATOR PEG REQUIREMENTS SHOULD BE PRESUMED POSSIBLE; A CLAIM OF IMPOSSIBILITY MUST BE DEMONSTRATED IN THE CERTIFICATION APPLICATION BY CLEAR AND CONVINCING EVIDENCE

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Because the Act requires a very brief (10 day) period within which the Commission must act on a certification application and because there is no limit on the frequency by which an open video system applicant may reapply for certification, the Commission should require sufficient information related to the applicant's compliance or anticipated compliance with the Act's requirements, including allocation of capacity and rates, and particularly from the interests of franchising authorities, information concerning PEG channel and services allocation. Notice, ¶69. PEG requirements that mirror each co-located cable system in the franchise areas within the proposed system's service area must be clearly identified in the certification application. The open video system applicant must be required to have consulted with each such franchising authority to ascertain PEG requirements and to serve the franchising authority with the application.

To the extent the application varies from the colocated cable system(s)' PEG obligations, the application must demonstrate by clear and convincing evidence

that it is impossible to duplicate the requirements. See section I.A.3., supra.

All grants should be subject to good faith petitions for reconsideration (and automatic stay) similar to the manner in which franchising authority certifications to regulate cable rates are subject to reconsideration. See, e.g., 47 C.F.R. §§ 76.910(b); 76.911. If the open video system applicant chooses to unilaterally address the issues raised in reconsideration, it may do so in a new application that does not have the claimed defect.

#### IV. ADVANCED TELECOMMUNICATIONS SERVICES

Olathe favors the use of open video systems to provide advanced telecommunications services through interconnection or otherwise, provided that these services can be offered over the system by other providers as well as the open video system operator, including by co-located cable operators.

#### V. THE COMMISSION SHOULD REAFFIRM THAT FRANCHISING AUTHORITIES RETAIN POWER UNDER STATE AND LOCAL LAW TO MANAGE THEIR PUBLIC RIGHTS OF WAY IN A NON DISCRIMINATORY MANNER WITH RESPECT TO OPEN VIDEO SYSTEMS

While the Commission correctly noticed that Section 621, 47 U.S.C. § 541, does not apply to open video systems (Notice, ¶6), the Commission has not confirmed in the Notice the intention of Congress in the Conference Report:

The conferees intend that an operator of an open video system under this part shall be

subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner.

Conference Report at H1126, Congressional Record (daily ed., January 31, 1996).

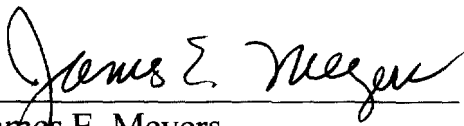
Inasmuch as section 621 contains the authority of franchising authorities to regulate the use of their rights-of-way by cable operators, the Commission, as part of its final regulations, should reaffirm the above-quoted statement of intention of the conferees so as to avoid unnecessary disclarity as franchising authorities seek to accommodate open video systems on their rights of way.

VI. CONCLUSION

In light of the above, the Commission's regulation of open video systems should fully accommodate the PEG access requirements of co-located cable systems in the franchise area.

Respectfully submitted,

CITY OF OLATHE, KANSAS

By:   
James E. Meyers  
Its Counsel

LAW OFFICE OF JAMES E.  
MEYERS  
1555 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20036  
1.202.232.2900  
1.202.232.2912 (Fax)